No. 93-67

Supreme Court, U.S.
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OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1992

JOHN A. HARRIS,

Petitioner,

vs.

OFFICE OF DISCIPLINARY COUNSEL OF THE SUPREME COURT OF PENNSYLVANIA,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of the Commonwealth of Pennsylvania

PETITION FOR WRIT OF CERTIORARI

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Lutz Appellate Services, inc.
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QUESTION PRESENTED FOR REVIEW

Was the attorney Petitioner's conduct of direct in-person solicitation of clients charged with crimes protected by the First and Fourteenth Amendments of the United States Constitution and was the finding of violation of Pennsylvania Rules of Professional Conduct, Rule 7.3, and the imposition of the professional discipline of an informal admonition in violation of the First Amendment of the United States Constitution since Rule 7.3(b) adequately protected the compelling state interest of avoiding overreaching invasion of privacy and the exercise of undue influence and the Petitioner had met the conditions of Rule 7.3(b)?

Is attorney in-person solicitation that does not involve coercion, duress, harassment or overreaching protected by the First and Fourteenth Amendments of the United States Constitution?

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Table of Contents	ii
Table of Citations	iii
Opinion Below	2
Statement of Jurisdiction	2
Constitutional Provisions and Regulations Involved	2
Statement of the Case	4
Reasons for Granting the Writ	7
I. The Petitioner's rights under the First and Fourteenth Amendments to the United State Constitution were violated by the finding of violation of Rule 7.3 of the Pennsylvania Rules of Professional Conduct and the resulting informal admonition since the Petitioner's solicitation of persons charged with criminal activity avoided the overreaching, undue influence and invasion of privacy, thereby negating the compelling state interest as reflected in Rule 7.3(b).	7
Conclusion	18

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Central Hudson Gas and Electric Corporation v. Public Service Commission of New York, 447 U.S. 557, 100 S. Ct. 2343 (1980) 11, 12

City of Cincinnati v. Discovery Network, Inc., __ U.S. __, 113 S. Ct. 1505 (1993) 14, 15

Edenfield v. Fane, __ U.S. __, __ S. Ct. __, 61 LW 4431 (April 26, 1993) 15, 16

In Re Primus, 436 U.S. 412, 98 S. Ct. 1893 (1978) 10, 11

Ohralik v. Ohio State Bar Association, 436 U.S. 447, 98 S. Ct. 1912 (1978) 9, 10, 11, 13

Shapero v. Kentucky Bar Assocation, 486 U.S. 466, 108 S. Ct. 1916 (1988) 13, 14

Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 105 S. Ct. 2265 (1985) 13

Statute Cited:

28 U.S.C.A. § 1257(a) 2

Contents

Page

United States Constitution Cited:

First Amendment ..... *passim*

Fourteenth Amendment ..... i, 1, 3, 7

Rules Cited:

Pennsylvania Rules of Professional Conduct:

Rule 7.3 ..... i, 1, 2, 3, 4, 5, 6, 7, 8, 17

Rule 7.3(a) 5, 6, 7, 8

Rule 7.3(b) ..... i, 7, 8, 12, 16

APPENDIX

Appendix A — Order of the Supreme Court of Pennsylvania Dated April 28, 1993 ..... 1a

Appendix B — Order of the Disciplinary Board of the Supreme Court of Pennsylvania Imposing an Informal Admonition Dated October 23, 1992 ..... 3a

Appendix C — Report of the Hearing Committee of the Supreme Court of Pennsylvania Recommending an Informal Admonition Filed July 28, 1992 ..... 7a

Appendix D — Stipulation of Fact 12a

Contents

Page

Appendix E — Petitioner's Petition for Review and Petition of Objections and Exceptions to the Supreme Court of Pennsylvania 15a

Appendix F — Petition for Discipline Filed December 26, 1991 ..... 21a

No.

In The

Supreme Court of the United States

October Term, 1992

JOHN A. HARRIS,

Petitioner,

vs.

OFFICE OF DISCIPLINARY COUNSEL OF THE SUPREME COURT OF PENNSYLVANIA,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of the Commonwealth of Pennsylvania

PETITION FOR WRIT OF CERTIORARI

The Petitioner, John A. Harris, an attorney admitted to practice law in the Commonwealth of Pennsylvania, by his attorney, Samuel C. Stretton, Esquire, respectfully requests that a writ of certiorari issue to review the Order of the Supreme Court of Pennsylvania entered on April 28, 1993, denying the Petitioner's request that the professional discipline of an informal admonition for violation of the Pennsylvania Code of Professional Conduct, Rule 7.3, was in violation of his rights under the First and Fourteenth Amendments of the United States Constitution. The review would also include the Order of the Disciplinary Board of

the Supreme Court of Pennsylvania dated October 23, 1992, which imposed the informal admonition, and the Report of the Hearing Committee of the Disciplinary Board of the Supreme Court of Pennsylvania dated July 28, 1992, which recommended the informal admonition.

OPINION BELOW

The Order of the Supreme Court of Pennsylvania was filed on April 28, 1993. The Order denied the Petitioner's Petition for Review and Petition of Objections and Exceptions. A copy of the April 28, 1993 Order of the Supreme Court of Pennsylvania is attached hereto and marked Appendix A. A copy of the October 23, 1992 Order of the Disciplinary Board of the Supreme Court of Pennsylvania recommending an informal admonition for violation of Rules of Professional Conduct, Rule 7.3, is attached and marked Appendix B. A copy of the July 28, 1992 Report of the Hearing Committee of the Disciplinary Board of the Supreme Court of Pennsylvania recommending an informal admonition for violation of Rule 7.3 of the Rules of Professional Conduct is attached and marked Appendix C.

STATEMENT OF JURISDICTION

The jurisdiction of this Honorable Court is invoked under 28 U.S.C.A. § 1257(a).

CONSTITUTIONAL PROVISIONS AND REGULATIONS INVOLVED

First Amendment of the United States Constitution which states as follows:

> Congress shall make no law respecting or establishing religion, or prohibiting the free

> exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Fourteenth Amendment of the United States Constitution which states as follows:

> No state shall make or enforce any law which shall abridge the privileges or amenities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Rule 7.3 of the Rules of Professional Conduct of the Supreme Court of Pennsylvania which states as follows:

> a. A lawyer shall not solicit in-person or by intermediary professional employment from a prospective client with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. The term "solicit" includes contact in person or by telephone, but, subject to the requirement of Rule 7.1 and Rule 7.3(b), does not include written communications, which may include targeted, direct mail advertisements.
>
> b. A lawyer shall not contact, or send a written communication to, a prospective client for the purpose of obtaining professional employment if:

1. the lawyer knows or reasonably should know that the physical, emotional or mental state of the person is such that the person could not. exercise reasonable judgment in employing a lawyer;

2. the person has made known to the lawyer a desire not to receive communications from the lawyer; or

3. the communication involves coercion, duress, or harassment.

STATEMENT OF THE CASE

The Petitioner, John A. Harris, was admitted to practice law in the Commonwealth of Pennsylvania in 1956 (Appendix D). At the time of the allegations, the Petitioner had an office to practice law in Philadelphia, Pennsylvania (Appendix D). The underlying facts are essentially undisputed and are set forth in the Stipulation found at Appendix D to this Petition. The Petitioner was present in Courtroom 146 of City Hall in Philadelphia, Pennsylvania, which is a Municipal Courtroom. The date in question was December 18, 1990. This courtroom was the criminal list room where persons charged with misdemeanor crimes had their cases listed to ascertain whether the case would go to trial, would be a plea, or would be eligible for the diversionary program. This listing was approximately three or more weeks after the criminal Defendants had been preliminarily arraigned and charged. The Defendants were not incarcerated.

As set forth in the Stipulation, the Petitioner sat next to the Court Officer before the beginning of the court session. The Petitioner would observe the names of the persons who indicated to the Court Officer that they had not retained counsel and would

also note whether or not there was any name of counsel of record next to the names of the various criminal defendants. Having ascertained the names of individuals who appeared not to be represented, the Petitioner would then call out their names in the courtroom. If an individual responded to the call of his or her name, the Petitioner would advise them that he was an attorney and was available to represent the person in the matter pending before the court if the individual so desired and did not have counsel. The Petitioner would ask the person if they desired to talk to him outside the courtroom. If the person said, "No," the Petitioner ended the conversation. If the person agreed to talk to the Petitioner, then the Petitioner would meet with the person outside the courtroom to discuss the case and his potential representation of the individual.

The procedural history of the case began when the Petitioner received from the Respondent, Office of Disciplinary Counsel, what is called a DB-7 or twenty day letter on February 25, 1991 outlining the above discussed allegation and advising him that he may be in violation of Rules of Professional Conduct, Rule 7.3, prohibiting in-person solicitation of clients. The Petitioner retained the services of present counsel and responded to the allegations by letter dated March 14, 1991. The letter essentially admitted the allegations but raised the First Amendment issue by way of defense.

A Petition for Discipline was filed against the Petitioner on or about December 26, 1991 by the Office of Disciplinary Counsel. The Petition for Discipline is found at Appendix F and, again, set forth the allegations that the Petitioner was involved with in-person solicitation on December 18, 1990 of persons charged with criminal matters in violation of Rule 7.3(a) of the Rules of Professional Conduct. The Petitioner filed a timely Answer to the Petition for Discipline essentially admitting the allegations but denying there was any violation and raising the First Amendment defense.

A hearing was held before Hearing Committee 1.07 of the Disciplinary Board of the Supreme Court of Pennsylvania on April 20, 1992. The Hearing Committee was comprised of three attorneys who were appointed to serve for a three year term by the Disciplinary Board. The attorneys were Mayer Horwitz, Esquire, John J. Cunningham, III, Esquire, and Robert D. Fox, Esquire.

During the hearing held on April 20, 1992, the Respondent, the Office of Disciplinary Counsel, was represented by Assistant Disciplinary Counsel William Lee Akers. The Petitioner, at all pertinent times, was represented by present counsel. The hearing essentially consisted of the agreed to Stipulation which is found, as previously mentioned, at Appendix D, which was submitted by both the Petitioner and the Respondent. The matter was then orally argued to the panel on the issue of the First Amendment and as to whether or not there was a violation.

Hearing Committee 1.07, on or about July 28, 1992, issued its Report and Recommendation. The Hearing Committee found a technical violation of Rule 7.3(a) and imposed an informal admonition which is the lowest form of discipline in the Pennsylvania disciplinary system and a private form of discipline.

The Petitioner, through his present counsel, took timely Exceptions to the Report and Recommendation of the Hearing Committee. The Exceptions were filed with the Disciplinary Board of the Supreme Court of Pennsylvania. The Objections and Exceptions were essentially based on the issue of the First Amendment. Oral argument was held before a panel of the Disciplinary Board of the Supreme Court of Pennsylvania on September 3, 1992. By Order dated October 23, 1992, the Disciplinary Board rejected the Objections and Exceptions of the Petitioner, John A. Harris, and imposed an informal admonition for violation of Rule 7.3 (Appendix B).

A timely Petition for Review and Petition of Objections and Exceptions was then filed with the Supreme Court of Pennsylvania (Appendix E). Without hearing, argument, or additional briefs, the Supreme Court of Pennsylvania, by Order dated April 28, 1993, denied the Petitioner's Petition for Review and Petition of Objections and Exceptions.

The matter, now having been concluded in the state court, the Petitioner has chosen to petition this Honorable Court raising once again the First Amendment protection in the context of in-person solicitation.

REASONS FOR GRANTING THE WRIT

I.

THE PETITIONER'S RIGHTS UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WERE VIOLATED BY THE FINDING OF VIOLATION OF RULE 7.3 OF THE PENNSYLVANIA RULES OF PROFESSIONAL CONDUCT AND THE RESULTING INFORMAL ADMONITION SINCE THE PETITIONER'S SOLICITATION OF PERSONS CHARGED WITH CRIMINAL ACTIVITY AVOIDED THE OVERREACHING, UNDUE INFLUENCE AND INVASION OF PRIVACY, THEREBY NEGATING THE COMPELLING STATE INTEREST AS REFLECTED IN RULE 7.3(b).

The compelling reason presented for review to this Honorable Court is whether the Petitioner's conduct is protected under the First Amendment because the State interests are adequately met by the three qualifications in Rule 7.3(b) of the Rules of Professional Conduct. Further the Petitioner's conduct would be protected under the First Amendment since it did not involve coercion,

duress, harassment or overreaching. The Petitioner's conduct as stipulated did not rise to the level of overreaching or undue influence or invasion of privacy which have, in the past, been concerns and considerations in prohibiting in-person solicitation. Rule 7.3 of the Rules of Professional Conduct adopted by the Supreme Court of Pennsylvania is quoted in the beginning of this Petition. Rule 7.3(a) prohibits a person from soliciting in-person a prospective client when a significant motive for doing so is the lawyer's pecuniary gain. Rule 7.3 excludes written communication. Rule 7.3(b) states a lawyer shall not contact, or send a written communication if three conditions are present. These conditions are that the lawyer knows or should know that the physical, emotional or mental state would prevent a person from exercising reasonable judgment, the person has made known to the lawyer his desire not to receive communication, or the communication involves coercion, duress, or harassment.

The Petitioner, John Harris, contends his conduct was protected by the First Amendment of the United States Constitution. The Petitioner further contends that these three Rule 7.3(b) qualifications adequately meet the compelling state interest to prevent a trained advocate from overreaching or invading a person's privacy or harassing or using coercion in reference to creating an attorney/client relationship. The stipulated-to facts of the present case clearly indicate that the three conditions of Rule 7.3(b) were not violated. The Petitioner, Mr. Harris, was not soliciting clients who had been arrested a day or two before and charged with criminal activity. At least three weeks had passed and all the individuals were not incarcerated and were appearing for their first listing after the preliminary arraignment. The Defendants had all been advised at the preliminary arraignment to obtain their own lawyer if they didn't already have one. Petitioner was only contacting persons who did not have counsel and who had not made arrangements to obtain any. He would only speak to them if they indicated a desire to speak to him. The Stipulation indicates

there was no coercion, duress, or harassment used by the Petitioner. The criminal charges were only misdemeanors.

The question of attorney direct in-person solicitation and the First Amendment was addressed in 1978 in two cases decided on the same day. The first case was *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 98 S. Ct. 1912 (1978). The *Ohralik* case dealt with an attorney who personally solicited an accident victim in an admittedly outrageous factual scenario. The lawyer learned a woman he casually knew had been injured in a motor vehicle accident and telephoned her parents. The lawyer learned that the lady was in the hospital and, after meeting with the lady's parents, went to the hospital and found her in traction. The lawyer then returned to the hospital two days later and signed up the client and, at the same time, contacted the other person in the motor vehicle without being invited and had her sign up as his client after telling her off-the-record that the first lady's insurance policy might also pay for her injuries. The lawyer was subsequently disciplined for this kind of conduct. The question presented to the United States Supreme Court was whether the First Amendment would protect the conduct of the lawyer, Ohralik. The United States Supreme Court held the conduct was not protected and affirmed the discipline given. The Court noted that purely commercial actions come within the First Amendment's protection. *Id.* 1918. The United States Supreme Court discussed the legitimate state interest in certain protections against direct solicitation.

> We need not discuss or evaluate each of these interests in detail as appellant has conceded that the State has a legitimate and indeed compelling interest in preventing those aspects of solicitation that involve fraud, undue influence, intimidation, overreaching, and other forms of vexatious conduct. [*Id.* 1921.]

The Supreme Court of the United States also noted the following.

> A lawyer's procurement of remunerative employment is a subject only marginally affected with the First Amendment concerns. It falls within the State's proper sphere of economic and professional regulation. [*Id.* 1920.]

The United States Supreme Court then indicated the facts in the present case were a striking example of the overreaching inherent in the one-to-one solicitation and found that the regulation did not offend the Constitution. Of interest is the concurring opinion of Justice Marshall. The concurring Opinion suggested that the holding in *Ohralik* was limited to the extreme factual scenario found in that particular matter.

Adding to confusion was the decision decided the same day of *In Re Primus*, 436 U.S. 412, 98 S. Ct. 1893 (1978). In that case, the Supreme Court of the United States reversed the solicitation discipline of an attorney who was working on behalf of the American Civil Liberties Union who sent letters to women who had been sterilized concerning potential litigation. Essentially, the attorney was acting for the purpose of public interest litigation. The United States Supreme Court did not find a violation and held the contact was protected by the First Amendment. The Court, to some extent, utilized as a distinguishing factor the motive of the person and whether the motive was one of public interest or one of pecuniary gain.

> Unlike the situation in *Ohralik*, however, appellant's act of solicitation took the form of a letter to a woman with whom the appellant had discussed the possibility of seeking redress for allegedly unconstitutional sterilization. This

> was not in-person solicitation for pecuniary gain. Appellant was communicating an offer of free assistance by attorneys associated with the American Civil Liberties Union .... [*Id.* 1905.]

The Supreme Court of the United States indicated the First Amendment did protect that kind of advocacy.

> The First and Fourteenth Amendments require a measure of protection for advocating lawful means of vindicating legal rights ... including advising another that his legal rights have been infringed and referring him to a particular attorney or a group of attorneys for assistance.... [*Id.* 1905.]

The *Primus* and *Ohralik* cases, therefore, define two extremes. When read together and read in conjunction with Justice Marshall's concurring Opinion in *Ohralik*, there appears to be a suggestion that a final decision in a less outrageous factual scenario on the question of in-person solicitation was still unresolved.

The next case of interest in evaluating the First Amendment and commercial speech is the case of *Central Hudson Gas and Electric Corporation v. Public Service Commission of New York*, 447 U.S. 557, 100 S. Ct. 2343 (1980). The case involved a public utility sending out promotional advertisements. The United States Supreme Court set forth a standard for the regulation of commercial speech.

> If the communication is neither misleading nor related to unlawful activity, the government's powers are more circumscribe.

> The State must assert a substantial interest to be achieved by restrictions on commercial speech. Moreover, the regulatory technique must be in proportion to that interest. The limitation on expression must be designed carefully to achieve the State's goal. Compliance with this requirement may be met by two criteria. First, the restriction must directly advance the State interest; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive. [*Id.* 2350.]

The Petitioner's argument is that the conditions set forth in Rule 7.3(b) of the Rules of Professional Conduct clearly protect the State's interest in prohibiting excessive, overreaching or coercive or related type of conduct. He contends that a general prohibition of direct solicitation is prohibited by the First Amendment since it is too broadly drawn and that his conduct, which he contends complies with Rule 7.3(b), adequately protects the governmental concerns and interests and is protected commercial speech. Further he contends solicitation which is not overreaching, not coercive, not harassment and not done with duress is protected by the First Amendment.

The benefit of in-person solicitation, that is not coercive or overreaching, is to allow more information to be provided and greater access to the legal system. Certainly, individuals who are not wealthy or who do not have personal attorneys would benefit from proper in-person solicitation because of the opportunity provided to be more aware of legal rights and remedies. Further, an

argument could be made that a general ban against in-person solicitation could severely impact small law firms and sole practitioners, since larger firms have other means to create and develop business while the small firm generally deals with persons who are not as sophisticated and with whom in-person solicitation would be the best way to reach them to fulfill their legal needs.

The next case of interest is *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 105 S. Ct. 2265 (1985). That case was known as the Dalkon Shield case since it involved an advertisement for women who suffered as a result of using that device as a diaphragm. The attorney was disciplined for using that advertisement. The discipline was reversed by the United States Supreme Court which indicated that the accurate and non-deceptive illustration of the device in the advertisement was protected by First Amendment interests. The Court noted that the concerns of coercion and overreaching expressed in *Ohralik* were not present in *Zauderer*. *Id.* 2277.

An important case on the issue of solicitations is the case of *Shapero v. Kentucky Bar Association*, 486 U.S. 466, 108 S. Ct. 1916 (1988). In that case, the Supreme Court of the United States held that states could not, consistent with the First and Fourteenth Amendments, prohibit lawyers from soliciting legal business for pecuniary gain by sending truthful, non-deceptive letters to potential clients. That case allowed the use of mailing to potential clients, letters advising, in a truthful fashion, of the attorney's availability and services.

> Commercial speech that is not false or deceptive and does not concern unlawful activities . . . may be restricted only in the services of substantial governmental interests and only through means that directly advance that interest. [*Id.* 1921.]

In the *Shapero* decision, the United States Supreme Court appeared to suggest there can be a complete ban on face-to-face solicitation.

> Our decision in *Ohralik* that a State could categorically ban all in-person solicitation turned on two factors. First, was our characterization of face-to-face solicitation as a practice rife with possibilities for overreaching, invasion of privacy, the exercise of undue influence and outright fraud . . . Second, unique difficulties . . . would frustrate any attempt at State regulation of in-person solicitation short of an absolute ban because such solicitation is not visible or otherwise open to public scrutiny. [*Id.* 1922.]

Therefore, the *Shapero* decision, although broadening the First Amendment protections for commercial speech of lawyers through directed mail, appeared to suggest that an outright ban on in-person solicitation was permissible. It should be noted the above quoted language was only dicta since the issue of direct in-person solicitation was not before the Court.

The issue of commercial speech and the First Amendment was revisited recently in two decisions. The first was *City of Cincinnati v. Discovery Network, Inc.*, __ U.S. __, 113 S. Ct. 1505 (1993). The Supreme Court of the United States held that a City's ban on a commercial publication through newsracks was inconsistent with the First Amendment. The Court balanced the interest of the City (safety and esthetics) with the First Amendment issue.

> The regulation is not a permissible regulation of commercial speech, for on this record it is clear that the interests that

> Cincinnati has asserted are unrelated to any distinction between commercial handbills and newspaper. Moreover, because the ban is predicated on the content of the publications distributed by the subject newsracks, it is not a valid time, place or manner restriction on protected speech. [*Id.* 1517.]

The Court noted the regulation was not "narrowly tailored." *Id.* 1517.

The Supreme Court of the United States, in a very recent decision, held that in-person solicitation by certified public accountants was protected by the First Amendment. *Edenfield v. Fane*, __ U.S. __, __ S. Ct. __, 61 LW 4431 (April 26, 1993). The Court notes the value of solicitation.

> In the commercial context, solicitation may have considerable value. Unlike many other forms of commercial expression, solicitation allows direct and spontaneous communication between buyer and seller. . . . Personal interchange enables a potential buyer to meet and evaluate the person offering the product or services. . . . Solicitation also enables the seller to direct his proposals toward those consumers whom he has a reason to believe would be most interested in what he has to sell. For the buyer, it provides an opportunity to explore in detail the way in which a particular product or service compares to its alternative in the market. [*Id.* 4432.]

The State asserted two compelling interests in banning direct solicitation. The first was to prevent fraud, deception and invasion

of privacy. The second was to maintain the independence of the profession. The Court noted the blanket ban in solicitation had not been supported by evidence to justify this burden placed on commercial speech. The Court further rejected the concept that a blanket ban could be justified as a prophylactic rule. The Court took great pains to distinguish lawyer solicitation from an accountant.

> The solicitation here poses none of the same dangers. Unlike a lawyer, a CPA is not a professional trained in the art of persuasion. A CPA training emphasizes independence and objectivity, not advocacy. [*Id.* 4435.]

The distinction is an interesting one since advocacy is only one part of legal training. Independence, objectivity, ethics and knowledge are the essence of a lawyer's training. Most lawyers are not trained advocates as seen from studies which suggest many lawyers rarely work in a courtroom.

The United States Supreme Court noted the following.

> Even under the First Amendment's somewhat more forgiving standards for restrictions on commercial speech, a State may not curb protected expression without advancing a substantial governmental interest. [*Id.* 4435.]

The Petitioner contends the state's concerns of invasion of privacy, overreaching, fraud, or duress can and have been adequately addressed by the prohibitions contained in Rule 7.3(b) of the Rules of Professional Conduct and the Petitioner's compliance with these rules.

In the present case, the Petitioner, Mr. Harris, clearly contends that his conduct should be protected by the First Amendment of the United States Constitution. He contends that his conduct, as stipulated to, was done in such a fashion that any of the concerns of overreaching, fraud, coercion, or abuse have been met. Further, he contends that Rule 7.3(b) adequately and properly provided the necessary restrictions to satisfy the compelling state interest. Disciplinary Counsel, at the hearing, admitted the Petitioner had not acted in an overreaching, harassing, or coercive fashion. Rule 7.3(b) of the Rules of Professional Conduct addresses the compelling state interest. The Petitioner contends that the need for access to legal services and the flow of information are protected by the First Amendment in commercial speech. He contends the Commonwealth's interests against the evils of in-person solicitation are met as long as the conditions of 7.3(b) are complied with. The Petitioner contends he did comply with Rule 7.3(b). He contends his conduct of in-person solicitation was protected by the First Amendment since it was guided by the prohibitions set forth in Rule 7.3(b). The Petitioner would respectfully request this Honorable Court grant his Petition requesting certiorari since the finding of violation and resulting discipline would be barred by the First Amendment.

The Petitioner respectfully contends that in-person solicitation in the manner in which he acted is Constitutionally protected conduct as long as it does not involve coercion, duress, harassment or overreaching.

CONCLUSION

The Petitioner, John A. Harris, by his counsel, Samuel C. Stretton, Esquire, respectfully requests this Honorable Court grant certiorari in the present case for the reasons above stated.

Respectfully submitted,

SAMUEL C. STRETTON
Attorney for Petitioner
301 South High St.
P.O. Box 3231
West Chester, Pennsylvania 19381
(215) 696-4243

APPENDIX A — ORDER OF THE SUPREME COURT OF PENNSYLVANIA DATED APRIL 28, 1993

IN THE SUPREME COURT OF PENNSYLVANIA

No. 930
Disciplinary Docket
No. 2

Disciplinary Board No. 120 DB 91

Attorney Registration
No. 23036
(Philadelphia)

OFFICE OF DISCIPLINARY COUNSEL,

Petitioner

v.

JOHN A. HARRIS,

Respondent

ORDER

PER CURIAM:

AND NOW, this 28th day of April, 1993, the Petition for Review and Petition of Objections and Exceptions are denied.

TRUE COPY FROM THE RECORD
Attest: April 29, 1993

Appendix A

s/ William G. Corey
WILLIAM G. COREY, ESQ.
Deputy Prothonotary — Eastern Dist.
Supreme Court of Pennsylvania

APPENDIX B — ORDER OF THE DISCIPLINARY BOARD OF THE SUPREME COURT OF PENNSYLVANIA IMPOSING AN INFORMAL ADMONITION DATED OCTOBER 23, 1992

THE DISCIPLINARY BOARD
OF THE
SUPREME COURT OF PENNSYLVANIA

First Floor
Two Lemoyne Drive
Lemoyne, PA 17043
(717) 731-7073

October 27, 1992

John A. Harris, Esq.
2600 Lewis Tower Building
225 S. 15th Street
Philadelphia, PA 19102

William Lee Akers
Assistant Disciplinary Counsel
The Discipinary Board of the
Supreme Court of Pennsylvania
2100 North American Building
121 S. Broad Street
Philadelphia, PA 19107

RE: Office of Disciplinary
Counsel v. JOHN A. HARRIS
No. 120 DB 91
Attorney Registration
No. 23036
(Philadelphia)

Dear Messrs. Harris and Akers:

This will advise that the Disciplinary Board at its executive meeting held on October 23, 1992 determined that an Informal Admonition be administered to the above respondent. A copy of the Order of the Disciplinary Board dated October 23, 1992 is enclosed.

Appendix B

Chief Disciplinary Counsel is requested to proceed accordingly.

Very truly yours,
s/ Elaine M. Bixler
Elaine M. Bixler
Secretary

/emb
Enclosure

cc: (with enclosure)
Samuel C. Stretton, Esq., Counsel for Respondent
John L. Doherty, Chief Disciplinary Counsel
Members of Hearing Committee 1.07
Mayer Horwitz, Esq., Chair
John J. Cunningham III, Esq.
Robert D. Fox, Esq.

Appendix B

BEFORE THE DISCIPLINARY BOARD OF THE SUPREME COURT OF PENNSYLVANIA

No. 120 DB 91

Attorney Registration No. 23036

(Philadelphia)

OFFICE OF DISCIPLINARY COUNSEL,

Petitioner

v.

JOHN A. HARRIS,

Respondent

ORDER

AND NOW, this 23rd day of October, 1992, upon consideration of the Report and Recommendation of Hearing Committee 1.07 filed July 28, 1992 and after oral argument before a three member panel of this Board; it is hereby

ORDERED that the said JOHN A. HARRIS of Philadelphia be subjected to an INFORMAL ADMONITION by Disciplinary Counsel as provided in Rule 204(a)(6) of the Pennsylvania Rules of Disciplinary Enforcement. Costs are to be paid by the Respondent.

Appendix B

BY THE BOARD:

s/ Richard D. Gilardi
Chairman

Mr. Saltz dissents.

TRUE COPY FROM RECORD
Attest:

s/ Elaine M. Bixler
Elaine M. Bixler, Secretary
The Disciplinary Board of the
Supreme Court of Pennsylvania

APPENDIX C — REPORT OF THE HEARING COMMITTEE OF THE SUPREME COURT OF PENNSYLVANIA RECOMMENDING AN INFORMAL ADMONITION FILED JULY 28, 1992

THE DISCIPLINARY BOARD
OF THE
SUPREME COURT OF PENNSYLVANIA

First Floor
Two Lemoyne Drive
Lemoyne, PA 17043
(717) 731-7073

July 28, 1992

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301 South High Street
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Assistant Disciplinary Counsel
Office of Disciplinary Counsel
2100 North American Building
121 South Broad Street
Philadelphia, PA 19107

RE: Office of Disciplinary Counsel
v. JOHN A. HARRIS
No. 120 DB 91
Attorney Registration No. 23036
(Philadelphia)

Dear Messrs. Stretton and Akers:

Attached please find copy of Report of Hearing Committee 1.07 in the above proceeding.

Your attention is invited to the provisions of Sections 89.201

and 89.202 of the Disciplinary Board Rules, with respect to the right of participants to file a brief on exceptions and a brief opposing exceptions and to request oral argument if desired. A copy of said sections is attached for your information.

Upon expiration of the time limits prescribed in said Rules, the matter will be referred to the Board for consideration. You will be notified subsequently of the action of the Board.

Very truly yours,
s/ Elaine M. Bixler
Elaine M. Bixler
Secretary

EMB/clg
Attachments

cc: John A. Harris, Esq., Respondent (w/attachment)
Members of Hearing Committee 1.07 (w/ attachment)
Mayer Horwitz, Chair
John J. Cunningham, III, Esq.
Robert D. Fox, Esq.
John L. Doherty, Chief Disciplinary

Appendix C

BEFORE THE DISCIPLINARY BOARD
OF THE SUPREME COURT OF PENNSYLVANIA

NO. 120 DB 91
Disciplinary

OFFICE OF THE DISCIPLINARY COUNSEL,

Petitioner

v.

JOHN A. HARRIS,

Respondent

HEARING COMMITTEE REPORT TO THE DISCIPLINARY BOARD OF THE SUPREME COURT OF PENNSYLVANIA

The facts giving rise with respect to the disciplinary action brought against John A. Harris are not in dispute. They are contained in a Stipulation entered into by and between the parties by their respective attorneys, which Stipulation was submitted to the Hearing Committee at the hearing which occurred on April 20, 1992. In addition, the facts contained in the Briefs filed by the Petitioner and Respondent do not basically differ.

In brief, the relevant facts are, Respondent John A. Harris, Esquire was admitted to practice law in the Commonwealth of Pennsylvania on or about May 12, 1956. On or about December 18, 1990, Respondent was present in Municipal Courtroom 146, City Hall, Philadelphia, Pennsylvania, which Court was convened to hear criminal charges against various individuals. Prior to the commencement of court proceedings, Respondent sat next to the Court officer and noted the names of persons who indicated that

they had not retained counsel or have an attorney of record. Respondent thereafter called out the names of those individuals who appeared to be unrepresented, in the courtroom. When an individual responded to the call of his name by Respondent, he would indicate to them that he was an attorney available to represent them in the matter then pending. Respondent would inquire whether the named person desired to talk to him outside the courtroom. If such person declined or said no, Respondent ended the conversation. If the person responded yes, Respondent met them outside the courtroom and discussed the case and his possible representation.

The issue before the Hearing Committee is whether Respondent's action violates the Rules of Professional Conduct 7.3(a) as modified by Rules of Professional Conduct 7.3(b).

Respondent believes that his conduct does not violate the above cited Rules, and further contends that Respondent received no knowledge that any communication made by Respondent was not desired. Further, Respondent avers that he used no coercion, duress or harassment, and that his conduct is protected under the First Amendment of the United States Constitution and related provisions of the Pennsylvania Constitution.

After a hearing before this Committee, based upon Stipulation of Facts submitted in writing, signed by the parties and counsel, and arguments and presentation of their briefs, the Committee was of the unanimous opinion that a technical violation of the cited Rules had been committed by the Respondent.

Upon advice of the Assistant Disciplinary Counsel and agreement of counsel for respondent, the Hearing Committee accepted the recommendation of Disciplinary Counsel that there is

no need for any addiional hearing or evidence on the level of discipline to be imposed, and accepted the opinion of the Office of Disciplinary Counsel that an informal admonition was the appropriate discipline to be imposed upon respondent in this matter.

s/ Mayer Horwitz
MAYER HORWITZ, ESQUIRE
Chairman
s/ John J. Cunningham, III
JOHN J. CUNNINGHAM, III, ESQUIRE

s/ Robert D. Fox
ROBERT D. FOX, ESQUIRE

APPENDIX D — STIPULATION OF FACT

BEFORE THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

NO. 120 DB 91

Attorney Registration
No. 23036

(Philadelphia County)

OFFICE OF DISCIPLINARY COUNSEL,

Petitioner

v.

JOHN A. HARRIS,

Respondent

STIPULATION

After review, Respondent, Respondent's counsel, and the Office of Disciplinary Counsel hereby stipulate and agree that the relevant facts in this matter are the following:

1. Petitioner, whose principal office is situated at Commerce Building, 300 N. Second Street, Harrisburg, Pennsylvania, is invested, pursuant to Rule 207 of the Pennsylvania Rules of Disciplinary Enforcement (hereinafter "Pa. R.D.E."), with the power and duty to investigate all matters involving alleged misconduct of any attorney to practice law in the Commonwealth of Pennsylvania and to prosecute all disciplinary proceedings brought in accordance with the various provisions of said Rules of Disciplinary Enforcement.

Appendix D

2. Respondent, John A. Harris, was admitted to practice law in the Commonwealth of Pennsylvania on or about May 12, 1956. His office is located at 2600 Lewis Tower Building, 225 S. 15th Street, Philadelphia, Pennsylvania 19102. Respondent is subject to the disciplinary jurisdiction of the Disciplinary Board of the Supreme Court.

3. On or about December 18, 1990, Respondent was present in the courtroom of Municipal Court, Room 146, City Hall, Philadelphia, Pennsylvania. On that date, the court was to convene to hear and dispose of criminal charges against certain individuals according to law.

4. Prior to the actual opening and commencement of court proceedings, Respondent sat next to the court officer and noted the names of persons who indicated to the court officer that they had not retained counsel and also noted the names of persons who did not have an attorney of record.

5. Having ascertained the names of individuals who appeared to be unrepresented, Respondent then called out their names in the courtroom.

6. When an individual responded to his or her name, Respondent would indicate to them that he was an attorney and he was available to represent them in the matter then pending before the court.

7. Respondent would inquire as to whether the named person desired to talk to him outside the courtroom. If the named person said no or declined, Respondent ended the conversation. If the named person said yes, Respondent met them outside the courtroom and discussed their case and his representation of such person.

Appendix D

8. Respondent believes that his conduct on December 18, 1990 does not violate Rules of Professional Conduct 7.3(a) as modified by Rules of Professional Conduct 7.3(b).

9. Respondent contends that more than three weeks have expired since the preliminary arraignment and:

a) Respondent had no knowledge that communication was not desired; and

b) Respondent used no coercion, duress or harrassment.

10. Further, the Respondent contends that his conduct is protected by the First Amendment of the United States Constitution and related provisions of the Pennsylvania Constitution.

The parties hereby agree that the available evidence establishes the above facts and that the respective parties agree to be bound by this stipulation of facts and that the Petition for Discipline heretofore filed may not be disposed of based upon the facts stated herein.

s/ John A. Harris
John A. Harris
Respondent

s/ William Lee Akers
William Lee Akers
Assistant Disciplinary Counsel

s/ Samuel C. Stretton
Samuel C. Stretton, Esquire
Counsel for Respondent

APPENDIX E — PETITIONER'S PETITION FOR REVIEW AND PETITION OF OBJECTIONS AND EXCEPTIONS TO THE SUPREME COURT OF PENNSYLVANIA

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

SUPREME COURT NO.

OFFICE OF DISCIPLINARY COUNSEL,

APPELLEE

VS.

JOHN A.HARRIS,

APPELLANT

PETITION FOR REVIEW AND PETITION OF OBJECTIONS AND EXCEPTIONS

The Petitioner/Appellant, John A. Harris, Esquire, by his counsel, Samuel C. Stretton, Esquire, respectfully files a Petition for Review to this Honorable Court from the Order of the Disciplinary Board of the Supreme Court of Pennsylvania recommending that an informal admonition be granted for violation of Rule of Professional Conduct 7.3(a) as follows:

I. JURISDICTION

1. This Honorable Court has jurisdiction over this matter pursuant to Article V, Section 10(c) of the Pennsylvania Constitution placing general responsibility for the practice of law and the supervision of the same with this Honorable Court. Further, this Honorable Court has jurisdiction pursuant to 42 Pa.

Appendix E

C.S.A. 725(5) placing exclusive jurisdiction in the Supreme Court of Pennsylvania from Orders of the Disciplinary Board of the Supreme Court of Pennsylvania. Further, this Honorable Court has jurisdiction pursuant to Pennsylvania Rules of Disciplinary Enforcement 208(e).

II. IDENTIFICATION OF PARTIES

2. The Petitioner/Appellant, John A. Harris, Esquire, is an attorney licensed to practice law in the Commonwealth of Pennsylvania and is a citizen and resident of the Commonwealth of Pennsylvania with a business address of 2600 Lewis Tower Building, 225 S. 15th Street, Philadelphia, Pennsylvania 19102.

3. The Respondent/Appellee, the Office of Disciplinary Counsel, is a duly constituted entity charged with the responsibility of investigating and prosecuting alleged violations of the Rules of Professional Conduct in the Commonwealth of Pennsylvania with an address of Suite 2100 North American Building, 121 S. Broad Street, Philadelphia, Pennsylvania 19107.

III. REFERENCE TOTHE ORDER OR DETERMINATION TO BE REVIEWED

4. The Petitioner/Appellant, John A. Harris, is seeking review of the Order of the Disciplinary Board of the Supreme Court of Pennsylvania dated October 23, 1992, which was received on October 30, 1992, ordering an informal admonition for violation of Rule 7.3(a) of the Rules of Professional Conduct. The Order of the Disciplinary Board of the Supreme Court of Pennsylvania is only a recommendation since this Honorable Court has de novo review in all disciplinary cases. Attached and marked Exhibit "A" is a copy of the October 23, 1992 Order of the Supreme Court of

Pennsylvania. Attached and marked Exhibit "B" is a copy of the Report and Recommendation of Hearing Committee 1.07 also recommending an informal admonition for violation of Professional Conduct Rule 7.3(a).

IV. STATEMENT OF OBJECTIONS

5. The Petitioner/Appellant excepts and objects to the finding of the Disciplinary Board of the Supreme Court of Pennsylvania and to the finding of the Hearing Committee 1.07 that he violated Rule of Professional Conduct 7.3 and, therefore, should receive an informal admonition. The Petitioner/Appellant, in his exceptions and objections, raises the following issues:

a. Rule 7.3(a) as modified by Rule 7.3(b), allows for direct solicitation by the Petitioner/Appellant. In the alternative, Rule 7.3(a) and Rule 7.3(b) of the Rules of Professional conduct are so vaguely and poorly drafted that fundamental due process pursuant to the Fifth and Fourteenth Amendments of the United States Constitution and related provisions under the Pennsylvania Constitution are violated since the Petitioner/Appellant did not have adequate notice that his conduct was a violation and, further, since the vague rules would allow for arbitrary and discriminatory prosecution.

b. The Petitioner/Appellant's conduct was protected commercial speech pursuant to the First Amendment of the United States Constitution and related provisions under the Pennsylvania Constitution since Rule of Professional Conduct 7.3(b) adequately addresses and protects the interests of the Commonwealth in

preventing overreaching, fraud, coersion or abuse and the conduct of the Respondent not only complied with Rule 7.3(b) but also met the need for access to legal service and the flow of information.

V. SHORT STATEMENT OF RELIEF SOUGHT

6. The Petitioner/Appellant, John A. Harris, respectfully requests this Honorable Court, pursuant to its de novo review, reject the Order of the Disciplinary Board of the Supreme Court of Pennsylvania and the Report and Recommendation of Hearing Committee 1.07 and find that the Petitioner/Appellant has not violated Rule of Professional Conduct 7.3 and find that he should not be given any discipline.

7. The Petitioner/Appellant respectfully requests that this Honorable Court find that his conduct was allowed by Rule 7.3 and/or, in the alternative, find that Rule 7.3(a), as modified by Rule 7.3(b) of the Rules of Professional Conduct, allowed for the manner of direct solicitation which was stipulated to by the parties in the above matter to have occurred. Further, the Petitioner/Appellant respectfully requests that, in the alternative, this Honorable Court rule that Rule 7.3(a), as modified by Rule 7.3(b) of the Rules of Professional Conduct, was so vaguely and poorly drafted that fundamental due process pursuant to the Fifth and Fourteenth Amendments of the United States Constitution and related provisions in the Pennsylvania Constitution was violated and, therefore, declare the aforementioned rules to be unconstitutional.

8. The Petitioner/Appellant respectfully requests this Honorable Court rule that Rule 7.3(a), as modified by Rule 7.3(b) of the Rules of Professional Conduct, provides for protected

commercial speech in the direct solicitation by the Petitioner/Appellant since the stipulated to direct solicitation of the Petitioner/Appellant is fully encompassed by the exceptions of Rule 7.3(b) concerning the protection against overreaching, fraud, coersion, or abuse since the Petitioner/Appellant contends he has complied with the three provisions of Rule 7.3(b) and the need for legal services and the flow of information are protected commercial speech. The Petitioner/Appellant contends the interests of the Commonwealth are adequately protected as long as the three conditions of Rule 7.3(b) are met and he contends that the evidence demonstrates that they were by the agreed to stipulation. Therefore, he contends and asks this Honorable Court rule that his conduct was protected by the First Amendment of the United States Constitution and related provisions under the Pennsylvania Constitution. The Petitioner/Appellant attaches and incorporates by reference his Brief on Exceptions to the Hearing Committee and he has marked that as Exhibit "C".

WHEREFORE, the Petitioner/Appellant, John A. Harris, Esquire, by his counsel Samuel C. Stretton, Esquire, respectfully requests this Honorable Court grant review of the Order and Recommendation of the Disciplinary Board of the Supreme Court of Pennsylvania granting an informal admonition for violation of Rule of Professional Conduct 7.3 and reverse the Order and Recommendation of an informal admonition for violation and find that the Petitioner/Appellant's conduct was permitted. Further, the Petitioner/Appellant respectfully requests this Honorable Court grant oral argument and a briefing schedule on these matters.

Appendix E

Respectfully submitted,
s/ Samuel C. Stretton
Samuel C. Stretton, Esquire
Attorney for Petitioner/Appellant
301 S. High St.
P.O. Box 3231
West Chester, PA 19381
(215) 696-4243
Attorney I.D. no. 18491

APPENDIX F — PETITION FOR DISCIPLINE FILED DECEMBER 26, 1991

BEFORE THE DISCIPLINARY BOARD OF THE SUPREME COURT OF PENNSYLVANIA

No. 120 DB 91

Attorney Registration No. 23036

(Philadelphia County)

OFFICE OF DISCIPLINARY COUNSEL

Petitioner

v.

JOHN A. HARRIS

Respondent

PETITIONER FOR DISCIPLINE

Petitioner, Office of Disciplinary Counsel, by William Lee Akers, Esq., Assistant Disciplinary Counsel and by Robert H. Davis, Jr., Esq., Acting Chief Disciplinary Counsel, files the within Petition for Discipline and charges Respondent, John A. Harris, with professional misconduct in violation of the Rules of Professional Conduct as follows:

1. Petitioner, whose principal office is situated at Commerce Building, 300 N. Second Street, Harrisburg, Pennsylvania, is invested pursuant to Rule 207 of the Pennsylvania Rules of Disciplinary Enforcement (hereinafter "Pa. R.D.E."), with the power and duty to investigate all matters involving alleged misconduct of any attorney admitted to practice law in the

Commonwealth of Pennsylvania and to prosecute all disciplinary proceedings brought in accordance with the various provisions of said Rules of Disciplinary Enforcement.

2. Respondent, John A. Harris, was admitted to practice law in the Commonwealth of Pennsylvania on or about May 12, 1956. His office is located at 2600 Lewis Tower Building, 225 S. 15th Street, Philadelphia, PA 19102. Respondent is subject to the disciplinary jurisdiction of the Disciplinary Board of the Supreme Court.

CHARGE

3. On or about December 18, 1990, you went to Municipal Courtroom 146 in City Hall, Philadelphia for the purpose of soliciting your employment as an attorney.

4. To effect this purpose, you seated yourself at the table with a court officer who was "checking in" accused persons as they reported into the courtroom.

5. As the court officer inquired of those persons checking in as to whether they were represented by counsel, you noted the names of those persons who indicated they had not engaged counsel and also those who had no counsel of record.

6. Before court officially opened and convened, you went through the courtroom loudly calling out the names of those persons who had either indicated that they were not represented or for whom no appearance had been filed.

7. When those persons answered or responded to the call of their names, you approached them directly and suggested your

employment as their attorney in their case then pending before the court.

8. Subsequent to December, 1990 you were specifically advised of the provisions of the Rules of Professional Conduct 7.3(a).

9. Thereafter, you responded, through counsel, that you would continue your direct in-person solicitation as heretofore described.

10. Petitioner believes and, therefore, avers that Respondent has, by his conduct as set forth in paragraphs 3 through 9, inclusive, violated the following Disciplinary Rules of the Code of Professional Responsibility and the Rules of Professional Conduct:

> A. RPC 7.3(a), a lawyer may not solicit in-person or by intermediary professional employment from a prospective client with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain.

WHEREFORE, your Petitioner prays that your Honorable Board appoint, pursuant to Rule 205 of the Pennsylvania Rules of Disciplinary Enforcement, a Hearing Committee to hear testimony and receive evidence in support of the aforesaid charges and upon completion of the said hearing, to make such findings of fact and recommendations for disciplinary action as it may deem appropriate.

Appendix F

Respectfully submitted,

OFFICE OF DISCIPLINARY COUNSEL

Robert H. Davis, Jr.
Acting Chief Disciplinary Counsel

By s/ William Lee Akers
William Lee Akers
Assistant Disciplinary Counsel

2100 North American Building
121 South Broad Street
Philadelphia, PA 19107
(215) 560-6296

Appendix F

COMMONWEALTH OF PENNSYLVANIA:
COUNTY OF PHILADELPHIA :

William Lee Akers, Esquire, being duly sworn according to law, deposes and says that he is Assistant Disciplinary Counsel of the Disciplinary Board of the Supreme Court of Pennsylvania, that he is authorized to take this affidavit on behalf of Petitioner and that the matters set forth in the attached Petition for Dicipline are true and correct to the best of his knowledge, information and belief.

s/ William Lee Akers

Sworn to and subscribed
before me this 19th
day of December, 1991.
s/ (illegible)

FILED
JUL 26 1993
OFFICE OF THE CLERK

(2)

No. 93-67

In The

Supreme Court of the United States

October Term, 1993

JOHN A. HARRIS,

Petitioner,

vs.

OFFICE OF DISCIPLINARY COUNSEL OF THE SUPREME COURT OF PENNSYLVANIA,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the Commonwealth of Pennsylvania

RESPONDENT'S BRIEF IN OPPOSITION

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BEST AVAILABLE COPY

QUESTION PRESENTED FOR REVIEW

Whether the Pennsylvania Rule of Professional Conduct which forbids in-person solicitation by attorneys unconstitutionally deprives Petitioner of his claimed First Amendment right of commercial speech?

TABLE OF CONTENTS

Page

Question Presented for Review i

Table of Contents ii

Table of Citations ii

Statement of the Case 1

Reasons for Denying the Writ 2

I. The factual basis is too narrow. 2

II. The Petition seeks re-examination of recently considered issues. 4

Conclusion 5

TABLE OF CITATIONS

Cases Cited:

Bates v. State Bar of Arizona, 433 U.S. 350 (1977) 3

Endenfield v. Fane, 113 U.S. __, 113 S. Ct. 1792, 61 Law Week 4431 (April, 1993) 4

Ohralik v. Ohio State Bar Association, 436 U.S. 447, 98 S. Ct. 1912 (1978) 3, 4, 5

Shapero v. Kentucky Bar Association, 486 U.S. 466, 108 S. Ct. 1916 (1988) 3

Contents

Page

Rules Cited:

Rules of Professional Conduct:

7.3(a) 3

7.3(b) 3

No. 93-67

In the

Supreme Court of the United States

October Term, 1993

JOHN A. HARRIS,

Petitioner,

vs.

OFFICE OF DISCIPLINARY COUNSEL OF THE SUPREME COURT OF PENNSYLVANIA,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the Commonwealth of Pennsylvania

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Office of Disciplinary Counsel of the Supreme Court of Pennsylvania, opposes the grant of a Writ of Certiorari on the Petition of John A. Harris.

STATEMENT OF THE CASE

The Statement of the Case submitted by the Petitioner is essentially correct. However, it presents certain ambiguities which should be clarified. Discipline was imposed upon the Petitioner not simply because of his actions on December 18, 1990.

Disciplinary action was instituted because the Petitioner stated his intention to continue in-person solicitations without limit. (Appendix F, paragraphs 8 and 9). Disciplinary action was instituted to prevent continuing repetitions of in-person solicitations by the Petitioner. Consequently, the stipulation as to the nature of Petitioner's conduct with his potential clients on December, 18, 1990 does not apply to any other date and is not to be extended to future solicitations.

It should be noted that the proposed imposition of an Informal Admonition does not impair or restrict the ability of an attorney to practice law. However, multiple and continuing infractions of the contested rule would, more than likely, result in discipline limiting or suspending the Petitioner's right to practice law.

REASONS FOR DENYING THE WRIT

I.

THE FACTUAL BASIS IS TOO NARROW.

The Petition's factual basis is too narrow for the Court's decision to substantially affect the rights of the Petitioner or the Respondent or others similarly situated.

While Respondent confirms that Petitioner used no coercion, duress or harassment on the stipulated day of December 18, 1990, that stipulation does not apply to any other day. Specifically, it does not apply to Petitioner's stated intention to continue in-person solicitations into the future without limit. Neither does the stipulation characterize or refer to Petitioner's conversations outside the courtroom after the initial confrontation. There are no facts of record as to the nature of the in-person solicitation for which the Petitioner seeks approval. A decision that Petitioner's conduct cannot be punished would be limited to the exact facts

stipulated to. It would not decide the rights of either the Petitioner or the Respondent prospectively. Other factual situations, such as whether the communication conducted outside the courtroom was accurate, complete, candid and unhurried cannot be decided on this record. A decision on the Writ would either have minimal value or would have to based on hypothetical facts and be, in effect, an advisory opinion.

Petitioner's mixture of Rule of Professional Conduct 7.3(a) with Rule 7.3(b) is misplaced. The two Rules are independent of each other. They regulate two different ways of marketing attorney's services. Rule 7.3(b) regulates written communication from attorney to prospective client. On the other hand, Rule 7.3(a) is an almost complete proscription against in-person solicitations.

The history of the enactment of Rule 7.3(a) and 7.3(b) by the Supreme Court of Pennsylvania makes their independence clear. Rule of Professional Conduct 7.3(b) was enacted and effective on April 1, 1988. At that time, Rule of Professional Conduct 7.3(a) was "reserved." The reason for the reservation was that *Bates v. Arizona* prevented the reenactment of the predecessor to Rule 7.3(a) which had forbidden advertisement by lawyers. In April, 1988, the case of *Shapero v. Kentucky Bar Association,* 486 U.S. 466, 108 S. Ct. 1916 (1988) was then pending in the Supreme Court of the United States. The Supreme Court of Pennsylvania therefore decided to wait until the decision in *Shapero* so it could draft a rule that would be compatible with both *Bates v. Arizona* and whatever the decision in *Shapero v. Kentucky Bar Association* might be. *Shapero* was decided on June 13, 1988. That decision was examined by the Pennsylvania Supreme Court which determined that this Court had not retreated from the principles of *Ohralik.* It then enacted Rule 7.3(a) effective November 7, 1988. It is a serious misconstruction to suggest that Rule of Professional Conduct 7.3(a) is "modified" by Rule of Professional Conduct 7.3(b). Neither is modified, reduced or expanded by the other.

II.

THE PETITION SEEKS RE-EXAMINATION OF RECENTLY CONSIDERED ISSUES.

The Petition seeks a re-examination of issues recently considered by this Court.

In order to declare Pennsylvania's rule forbidding in-person solicitation by attorneys unenforceable, the Court would have to reverse *Ohralik v. Ohio State Bar Association,* 436 U.S. 447, 98 S. Ct. 1912 (1978). *Ohralik,* was recently cited with apparent approval in the matter of *Endenfield v. Fane,* 113 U.S. __, 113 S. Ct. 1792, 61 Law Week 4431 (April, 1993). Petitioner asks the Court to disregard the distinction between accountants and attorneys and apply the rule of *Endenfield* to attorneys.

Respondent believes that *Ohralik* was properly decided and should not be overruled. Respondent agrees with the cautions and conditions described and enumerated in *Ohralik* as reasons why in-person solicitation by attorneys is undesirable as a matter of public policy. In addition, Respondent believes that if an attorney is permitted to make in-person solicitation, then he must be permitted to hire others to make in-person solicitation on his behalf. Supervising, controlling and policing such solicitations would be impossible. The public's interest in obtaining undistorted, uncolored, candid and complete information about its alternatives under our legal system would be in grave jeopardy.

Like *Ohralik,* this Petitioner believes that his conduct is to be judged and regulated by the harm that was actually caused. This is an incorrect standard.

> Appellant's argument misconceives the nature of the State's interest. The Rules prohibiting

> solicitation are prophylactic measures whose objective is the prevention of harm before it occurs. The Rules were applied in this case to discipline a lawyer for soliciting employment for pecuniary gain under circumstances likely to result in the adverse consequences the state seeks to avert.

Ohralik v. Ohio, 436 U.S. 447, 464.

Consequently, the lack of demonstrated harm is no defense to the violation of the Rule. Unless the recent citations of *Ohralik* are misleading and the Court is prepared to overrule it, issuing the Writ would serve no purpose.

CONCLUSION

Respondent, Office of Disciplinary Counsel, respectfully requests that this Honorable Court deny the requested Writ of Certiorari.

Respectfully submitted,

OFFICE OF DISCIPLINARY COUNSEL
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WILLIAM LEE AKERS
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